JOHN R. LIEBMAN*

The Export Administration Amendments Act of 1985

When President Reagan signed S. 883, the Export Administration Amendments Act of 1985 (the "1985 Act") into law on July 12, 1985,[1] he noted that the new legislation ". . . involves a delicate balancing of national as well as programmatic objectives . . ." and that it ". . . strikes an acceptable balance between enhancing our commercial interests and protecting our national security interests. . . ."[2] These bland, upbeat characterizations scarcely hint at the intense turf battles and deep philosophical differences that were aired during a renewal process that spanned more than three years and resulted in one of the longest House–Senate conferences in recent memory.

I. History of the Act

The 1985 Act reauthorized and amended U.S. export controls which, in one form or another, have been extant for more than four decades. Originally conceived during World War II to avert shortages of basic commodities,[3] export controls came to reflect concerns with national security and foreign policy as political relations between the U.S. and the Soviet Union worsened following the war. Under the Export Control Act of 1949,[4] prospective exports were reviewed by the Department of Commerce in terms of their possible military significance, and major revisions to the law

*Partner, Nossaman, Guthner, Knox & Elliott, Los Angeles, California.

1. Pub. L. 99–64 (July 12, 1985).

2. The President's statement has been reproduced in full in 8 BUS. AM., No. 18 (U.S. Department of Commerce, Sept. 2, 1985).

3. 50 U.S.C. app. 701, as amended June 30, 1942, c. 461, 56 Stat. 463.

4. Ch. 11, 63 Stat. 7.

were enacted in the Export Administration Acts of 1969[5] and 1979[6] which added foreign policy concerns as criteria for the imposition and administration of export controls, as well as sharpening and redefining the scope of national security controls. In 1965, the first Arab boycott amendments to the basic legislation[7] appeared which, along with short supply controls,[8] have found a permanent home in this law.

The Export Control Act of 1949 and its progeny, of course, are not the only legislative mechanisms which impose export controls. The Arms Export Control Act of 1976[9] authorizes the control of commercial arms exports (*i.e.*, export sales of those items which appear on the Munitions List)[10] by the Department of State. The Nuclear Regulatory Commission[11] and the Department of Energy[12] also are authorized to control exports of certain commodities and technologies with which they are particularly familiar. But in terms of regulating commercial exports, the agencies having the greatest interest in these transactions—Commerce, State, Defense, and the National Security Council—comprise the "export control community" and assert the greatest influence in determining which commodities and technologies will be permitted to go to which consignees in which countries.

In addition to license activities, enforcement of these controls had been administered by the Department of Commerce and, where appropriate, the Department of Justice. By 1981, however, the Customs Service had joined the fray with "Operation EXODUS"—a code name for what amounted to a strike force to interdict illegal exports—thereby laying the groundwork for one of the most bitter and acrimonious jurisdictional struggles reflected in the 1985 Act.

II. Conflicts and Compromises of the 1985 Act

The compromises reflected in the 1985 Act cannot be comprehended without understanding the nature and strength of the interests which competed in the process. The stage for these conflicts was set long before renewal bills were introduced in the 98th Congress. In reauthorizing the export control law in 1979, Congress was told by the business community that export controls were cumbersome, unfairly and unevenly administered, and in some instances were unnecessary because many of our trading partners were able to freely provide equivalent goods and technologies to a

5. Pub. L. 91–184, 83 Stat. 841.
6. Pub. L. 96–72, 93 Stat. 503, 50 U.S.C. app. 2401–2420.
7. Pub. L. 89–63, 79 Stat. 209.
8. 50 U.S.C. app. 2406.
9. Pub. L. 94–324, 22 U.S.C. 2778–2779.
10. 22 C.F.R. 121.01.
11. 42 U.S.C. 2047, 2155.
12. 42 U.S.C. 6212.

marketplace which U.S. suppliers no longer dominated. At the same time, relations between the U.S. and the Soviet Union had improved, and public concern with human rights in the Republic of South Africa was diffuse.

The resultant reauthorization—the Export Administration Act of 1979[13]—reflected many of the concerns of the business community by imposing for the first time, for example, specific time limits on the Commerce Department for the processing of export license applications.[14] More significantly, the reauthorization period was a brief four years.[15] In that relatively short period, however, conditions affecting export control policy changed remarkably. Congress thus was obliged to face another renewal of the law in the face of increased concerns from the defense establishment over the leakage of critical technologies to the Russians, as well as continued complaints from the business community about slow processing of license applications. Against the backdrop of the change in control of the Senate, generally miserable relations with the Soviet Union, and the political fallout from the Carter Administration's use of foreign policy controls to embargo wheat sales and sales of gas pipelines material to the Soviet Union, the business community and the defense establishment were on a collison course.

III. Congressional Action

A. 98th Congress—Temporary Extension

The 98th Congress failed to forge agreement for the renewal of the Export Administration Act of 1979, requiring the enactment of simple, temporary extensions when that law expired on September 30, 1983 and, ultimately, extensions by the President under the International Emergency Economic Powers Act.[16] In addition to the jurisdictional and regulatory policy differences dividing the House and Senate, new issues appeared as riders to several of the renewal bills introduced in the 98th Congress, chief among which was Title III of H.R. 4230 positing restrictions on investment in and trading with the Republic of South Africa.

Ultimately, both houses passed their versions of a renewal bill: H.R. 4230 and S. 979. Both bills were reported out with complete committee reports[17] which, together with the "probable" conference report which was inserted

13. Pub. L. 96–72, 93 Stat. 503, 50 U.S.C. app. 2401–2420.
14. 50 U.S.C. app. 2409.
15. 50 U.S.C. app. 2419.
16. 50 U.S.C. 1701–1706. The first extension of the S. 979 Act under IEEPA was promulgated on October 14, 1983 by Executive Order No. 12444 (48 Fed. Reg. 48215); the second extension was promulgated on March 30, 1984 by Executive Order No. 12470 (49 Fed. Reg. 13099).
17. H.R. Rep. No. 257, 98th Cong., 1st Sess. (1983) and S. Rep. No. 170, 98th Cong., 1st Sess. (1983).

into the record even as the seven-month-long conference foundered,[18] furnish an unusually rich legislative history.

B. 99TH CONGRESS—GETTING ON THE "FAST TRACK"

Congressional leaders in the 99th Congress expressed unequivocally their desire to avoid a repetition of the bitter battle from which they had recently emerged. Lobbyists for various industry interests and other leaders of the business community also expressed concern that a full debate of the issues could jeopardize many of the improvements incorporated in H.R. 4230 and S. 979 that they had wrested with considerable effort (and, undoubtedly, at great expense). With attention focusing on the federal budget deficit, the MX missile appropriation, tax reform, and several other highly visible issues, a great deal of pressure mounted to route renewal legislation onto a "fast track" and keep the genie in the bottle.

Renewal bills embodying the near-compromise reflected in H.R. 4230 were marked up by the House Committee on Foreign Affairs and reported out as H.R. 1786 before the 1985 Easter recess. The Senate meanwhile enacted a simple extension (S. 883) which was sent to the House where, for all intents and purposes, it was replaced by H.R. 1786 on April 16, 1985, and returned to the Senate for concurrence. Because the House tinkered with some of the agreed provisions, the deal nearly fell apart again; however, with considerable renegotiation and a few amendments, the Senate finally receded to the House version on June 25, and the bill was sent to the White House. Even with a "fast track" renewal, the House managers again submitted a full report accompanying H.R. 1786 as well as a joint explanatory statement of the conference.[19]

C. EFFECT OF CONGRESSIONAL DEADLOCK

Despite mounting uncertainties over the reach of the President's emergency powers during the 1984 hiatus,[20] the Congressional deadlock apparently had little effect on the day-to-day administration of export controls. It was during this period, in fact, that the Commerce Department overhauled completely the procedures governing the issuance and use of distribution licenses,[21] and acceded to a Memorandum of Understanding

18. 130 CONG. REC. H12150 (daily ed. Oct. 11, 1984).

19. 131 CONG. REC. H4918 (daily ed. June 25, 1985).

20. The Ninth Circuit Court of Appeals earlier had upheld the validity of an IEEPA extension of the Export Administration Act in United States v. Spawr Optical, Inc., 685 F.2d 1076 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 1875 (1983), but such extensions cannot encompass powers which only the Congress may expressly confer upon the President, *e.g.*, the exclusion of the Administrative Procedures Act provided in Sec. 13(a) of the law (50 U.S.C. app. § 2412(a)). *See* Nuclear Pacific, Inc. v. United States, Case No. C84-49R (W.D. Wash. 1984).

21. 50 Fed. Reg. 21, 562 (1985) (to be codified at 15 C.F.R. § 373).

with the Defense Department granting that agency concurrent licensing jurisdiction over the export of certain "high tech" commodities and technical data to fifteen non-Nato "free world" destinations.[22]

Similarly, most of the changes made by the 1985 Act will not have a near-term effect on U.S. exporters. Procedural and policy changes found in the 1985 Act, for the most part, will require significant time to be felt by the vast majority of U.S. exporters; nonetheless, there are several features of the 1985 Act which promise to have an immediate impact. These are found in the amendments to sec. 5 (national security controls), sec. 6 (foreign policy controls), sec. 10 (license application procedures), sec. 11 (violations), and sec. 12 (enforcement).

IV. Impact of Changes in the 1985 Act

A. National Security Controls

One of the most important features of the 1985 Act is its silence with reference to the People's Republic of China. S. 979 had included an addition to sec. 5 which, in effect, imposed a blanket validated license requirement with respect to all exports to "nuclear" countries other than NATO countries and countries which had ratified and complied with the nonproliferation treaty. That language would have included the People's Republic of China. The House had expressly stated, in its proposal, that exports to the People's Republic of China should be subject to no greater controls than exports to any friendly, non-aligned country. Neither version appears in the 1985 Act, suggesting that exports to the People's Republic of China will continue to be subject to the same export licensing vagaries as has been the case for the past several years.

Another potentially significant amendment of sec. 5 is the requirement that the Control List (formerly, the Commodity Control List) be reviewed annually, and that the annual reviews include a review of at least one-third of the COCOM list. To the extent that these more frequent reviews result in a reduction in the numbers of controlled commodities, annual reviews could have a materially beneficial effect upon U.S. exporters. Whether this will be the result, of course, is an open issue. In that same vein is the provision of the 1985 Act declaring that the presence of an imbedded microprocessor in a particular commodity *ipso facto* will not give rise to its control.

The amendments regarding the foreign availability issue represent the

22. The Memorandum of Understanding is classified; however, it undoubtedly ameliorated the dispute between the House and Senate over the "10(g)" amendments, in which the Senate sought overall concurrent jurisdiction for the Defense Department in reference to licenses for all exports of commodities and technical data controlled because of national security considerations. *See* H.R. Rep. No. 180, 99th Cong., 1st Sess. (1985), *reprinted in* 131 Cong. Rec. H4905, 4922 (daily ed. June 25, 1985).

potentially most far-reaching improvements to the 1979 Act. Until this time, foreign availability was a meaningful concept only to those within the family of regulatory agencies who accepted its premise. The 1985 Act partially shifts the burden of proof regarding foreign availability to the Commerce Department, and further requires the Secretary of Commerce to attempt to eliminate foreign availability of controlled commodities by negotiating with the foreign governments concerned. The 1985 Act also establishes for the first time an Office of Foreign Availability within the Commerce Department, and requires the Department to promulgate regulations regarding foreign availability.

Finally, the 1985 Act incorporates improvements with respect to exports of relatively low-technology controlled commodities to COCOM countries which, if effective, will ensure U.S. exporters' ability to ship within fifteen to thirty days from submission of the application for a validated export license.

B. Foreign Policy Controls

Foreign policy controls have been the source of a great deal of controversy, both within the United States and abroad. The Senate version of the renewal legislation endeavored to prohibit the retroactive application of foreign policy controls to *any* contract in existence at the time of their imposition. The House version of the renewal legislation addressed this point as well, but enumerated several exceptions to the so-called "contract sanctity" rule. The latter version is embodied in the 1985 Act.

Another serious concern not resolved by the 1985 Act is the issue of the extraterritorial application of U.S. laws. This matter was hotly and publicly debated when the United States Government, in response to the Soviet invasion of Afghanistan, ordered all U.S. firms and their foreign subsidiaries not to honor contracts in relation to the construction of the Soviet gas pipeline to Western Europe. In fact, several instances arose in that period in which foreign courts directed subsidiaries of U.S. firms within their jurisdictions *not* to obey these U.S. edicts.[23] The House of Representatives endeavored to limit the application of U.S. export controls to the export of goods or technology produced in the United States, but the conference committee receded to the Senate position. As stated in the draft conference report:

> Extraterritorial application of U.S. export controls affecting non-contractual transactions and relationships remains a serious matter of contention and strain upon U.S. relations with other countries, particularly with European govern-

23. *See, e.g., Compagnie Europeene des Petroles S.A. v. Sensor Nederland B.V.*, 22 I.L.M. 66 (1983). *See also, European Community: Comments on the U.S. Regulations Concerning Trade with U.S.S.R.*, 21 I.L.M. 891 (1982).

ments, and possible ways of further limiting such effects merit continued study and consideration.[24]

C. Export License Application Procedures

As finally worked out between the House of Representatives and the Senate, the amendments to sec. 10 of the Export Administration Act reduce by one-third the times permitted for each phase of the application review process. The amendments further impose on the Commerce Department the obligation to advise applicants of its intention to deny an application and the reasons therefor, and to allow applicants an opportunity to address the issues raised.

One very serious issue raised during the 98th Congress was the attempt by the Senate to confer upon the Defense Department the right to review all applications for exports to any country to which exports are controlled for national security purposes—the so-called "10(g) amendments." The conference committee was unable to resolve this issue which, together with the addition of the anti-apartheid provisions found in Title III as proposed by the House, was largely responsible for the failure of the Congress to pass the renewal legislation last year. Both of these provisions have been eliminated from the 1985 Act.

D. Violations

Although some of the amendments effected by the 1985 Act to sec. 11 reaffirm existing law—for example, the concept of general criminal intent and the insulation of administrative sanctions from judicial review—others significantly expand legal concepts of culpability to include conspiracy and attempts to violate the Act.

E. Enforcement

As mentioned earlier, one of the battles fought during the 98th Congress concerned the shared enforcement roles of the Commerce Department and the Customs Service. The Senate originally attempted to shift most enforcement jurisdiction from Commerce to Customs, while the House of Representatives attempted to expand the capacity of the Commerce Department in its enforcement role while preserving the notion of shared responsibility.

The conference committee agreed to continue the Commerce Department's exclusive authority to impose civil penalties under sec. 11 of the Act and to enforce the anti-boycott provisions found in sec. 8. Concurrent enforcement authority is maintained with respect to both pre- and post-

24. 130 Cong. Rec. H12153 (daily ed. Oct. 11, 1984).

license investigations, but the ability of Commerce Department personnel to conduct investigations at U.S. ports is subject to Customs' concurrence. Commerce Department enforcement personnel are given broader enforcement authority, including the power to execute warrants, carry firearms, and to make arrests if "probable cause" exists. Finally, the 1985 Act attempts to clarify the authority of Customs personnel to conduct investigations of possible export violations at U.S. borders, and specifically grants authority to Customs to make arrests without warrants under certain legal restrictions.

This discussion necessarily barely scratches the surface of what Congressman Bonker has characterized as "an exceedingly complex bill."[25] To the extent that these amendments will be reflected in licensing and enforcement activities in the near future, they bear close scrutiny.

25. 130 CONG. REC. H12150 (daily ed. Oct. 11, 1984).